propensity, openly or clandestinely, to add to the mounting tension prevailing then.

6 I crave leave to refer to paras 3-4 of my earlier affidavit and further state that before I made the detention order against the applicant, I had considered very carefully the allegations of fact I had before me. Those allegations furnished five recorded instances of speeches made by the applicant which played up racial issues and would stir up racial sentiments. Although the allegations of fact were separated by considerable intervals and the latest was on 2 August 1985, I was satisfied that, having regard to the circumstances prevailing at the time when I made the order, they constituted material from which I could conclude that there was a reasonable probability that, but for the making of the detention order, the applicant would have acted in a manner prejudicial to the security of the nation, and I did so conclude. Indeed, to my mind at that time, those allegations showed a propensity in the applicant to play up racial issues and stir up racial sentiments, and given the then existing volatile situation, I was personally satisfied that if the applicant was not further detained, he would in all likelihood, in the tense and dangerous situation prevailing at the time, act in a manner prejudicial to the security of Malaysia. I was therefore satisfied that his detention was necessary with a view to preventing him from so acting and I am now still satisfied that his continued detention is necessary.

7 Previous to that, no action had been taken against the applicant, although he had been known to make the speeches referred to in the allegations of fact. But as I explained in the Dewan Rakyat, since 1981 the government had adopted a liberal policy and had refrained from taking any action in respect of incidents previously considered provocative or prejudicial to the security of the nation. However, as it turned out, this liberal attitude of the government was, time and again, exploited by various groups who played up racial and religious and other sensitive issues, thereby bringing about various tense situations. The tension escalated to a dangerous level culminating in a highly volatile and dangerous situation in the country sometime in October 1987, necessitating a departure from the previously liberal stand in order to defuse the situation and protect the country from any calamity. That was the reason why no action was taken against the applicant before October 1987.

I find that the minister's averments are a satisfactory explanation for the delay and that such explanation has dispelled any inference that the minister's subjective satisfaction was not genuine or colourable. The applicant therefore aalso fails on this point.

As the applicant has failed to show that the minister's power had been exercised mala fide or improperly or made for a collateral or ulterior purpose he must fail in this application.

This application is therefore dismissed.

Application dismissed.

Solicitors: *Abbas & Ngan; Shan Gooi & Huang.*

Reported by *PS Ranjan*

Overseas Chinese Banking Corporation Ltd v Lee Tan Hwa & Anor (Goh Ah Chwee & Anor, Interveners)

HIGH COURT (MUAR) – ORIGINATING SUMMONS NO 239 OF 1983
EUSOFF CHIN J
4 AUGUST 1988

Land Law – Sale of part of land to purchasers – Whole of land subsequently charged by vendors – Same firm of solicitors acting for vendors, purchasers and chargee – Whether knowledge of solicitors regarding interest of purchasers imputed to chargee – Application by chargee for sale of land – Whether charge valid – Whether order of sale may be made – National Land Code 1965, ss 256 & 257

Legal Profession – Solicitors acting for more than one party in a transaction – Duty of solicitors – Disclosure of communications received by solicitor from one party to the other – Knowledge of solicitors – Whether imputed to client

The defendants had charged their land to the plaintiff in 1979 as security for an overdraft facility. However, in 1977 the second defendant had sold a one-third share of the land to the first intervener and in 1978 the first defendant had sold another one-third share to the second intervener.

In both sale and purchase transactions, the same firm of solicitors had acted for each of the vendors, namely, the defendants, and for each of the purchasers, namely, the interveners. In the charge transaction, the solicitors had acted for the chargors, namely, the defendants, as well as for the chargee, namely, the plaintiff. Both the interveners did not at any time give their consent to their respective lands being charged to the plaintiff. The first intervener had paid the full purchase price for the land that he had purchased and had obtained a court order for possession of the land.

Eventually, the plaintiff applied to the court for an order for sale of the land under ss 256 and 257 of the National Land Code 1965. The interveners opposed the application. For the plaintiff, it was contended that they were not aware of any sale and purchase agreement having been previously executed by the defendants with the interveners. The plaintiff contended that they had therefore taken the charge without notice of the interveners' interest in the land notwithstanding that the plaintiff's solicitors had knowledge of the sale and purchase transactions. The plaintiffs also contended that the interveners ought to have lodged a caveat in respect of the land.

Held, dismissing the application:

(1) The rule is that where two parties employ the same solicitor, communications passing between either of them and the solicitor in his joint capacity must be disclosed in favour of the other, and further where the evidence showed that a party had placed himself entirely in the hands of his solicitor and constituted him his general agent in the transactions, the knowledge of the solicitor must be imputed to him. So in this case the knowledge of the solicitors that the interveners had bought two-thirds of the land before it was charged to the plaintiff ought to be imputed to the plaintiff, and the plaintiff must be treated as having had notice of the sale to the interveners before the land was charged to the plaintiff.

(2) It is true that a purchaser of land under an agreement has to protect his interest by filing a caveat in respect of the land but as the interveners had employed solicitors to act for them in

the purchase transactions they had to rely on their solicitors, who were acting professionally for them, to advise them and to file the caveats for them to protect their interests in the land.

(3) The charge of the whole land to the plaintiff could not be a valid charge since a substantial portion of it was not absolutely owned by the defendants.

(4) Now that the first intervener had completed the purchase and had gone into possession of his share of the land, it would not be justified and would be plainly unconscionable to deprive him of what he had bought by holding that the charge was valid when in fact it was void.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 219 of 1988.]

Cases referred to

1 *Dixon* v *Winch* [1900] 1 Ch D 736 (folld)
2 *Haroon bin Guriaman* v *Nik Mah bte Nik Mat & Anor* [1951] MLJ 209 (folld)

Legislation referred to

National Land Code 1965 ss 256, 257

JA Nathan for the plaintiff.
E Ramasamy for the interveners.

Cur Adv Vult

Eusoff Chin J: Lee Tan Hwa and Goh Jun Hoon who owned land Lot 666, Grant No 3306, township of Bandar Maharani, having an area of 4,715 sq ft charged the land to Overseas Chinese Banking Corporation (plaintiff) on 4 February 1979 as security for overdraft of $216,000 (out of an authorized limit of $246,000 for principal). The plaintiff granted the $216,000 to the defendants.

On 26 October 1982, the amount owing by the first and second defendants to the plaintiff was $259,899.42. The plaintiff issued notice of demand by AR registered post on the first and second defendants on 13 November 1982 for payment of the said sum within twenty-one days. The amount not being settled by the first and second defendants, the plaintiff sent to both the first and second defendants a statutory notice of default under s 254 of the National Land Code 1965. This was done by AR registered post on 2 March 1983, and the service of the notice was effected on the defendants on 4 March 1983. The amount due was not paid by the defendants, and the plaintiff applied to court for the sale of the land under ss 256 and 257 of the National Land Code.

There are three adjoining units of three-storey shophouses on this land.

Goh Ah Chwee and Chua Choon Yam were granted leave by the court to intervene, and were joined as parties to this application for sale. Goh Ah Chwee in his affidavits dated 7 May 1985 and 19 November 1985, stated that he had bought one-third of the said land from the second defendant on 3 September 1977 for $183,000. He produced the sale and purchase agreement and the receipts for the payment of $183,000.

Chua Choon Yam had bought one-third of the said land from Lee Tan Hwa (first defendant) on 2 April 1978. He had paid $96,000 to the first defendant, and had a balance of $77,000 which he is prepared to pay.

Both the interveners had engaged the same firm of solicitors to effect the sale and purchase transactions. The interveners claimed priority over the land since they had bought the land before the land was charged to the plaintiff by the defendants on 4 February 1979.

Both the interveners did not at any time give their consent to their lands being charged to the plaintiff.

In both the sale and purchase transactions, and the charge transactions, the same firm of solicitors had acted for the original land owners (first and second defendants), the purchasers (interveners), the chargors (first and second defendants) and the chargee (plaintiff).

For the plaintiff, the crux of its contention is that the plaintiff was not aware of any sale or purchase agreements having been previously executed by the chargors (first and second defendants) to the interveners. The plaintiff contended that they had therefore taken the charge without notice notwithstanding that their solicitors had knowledge of the previous sale transaction.

The interveners' argument is that notwithstanding that there was no caveat, the solicitors who acted in the charge transaction were the same solicitors who had acted in the sale and purchase transactions, and the solicitors were fully aware of the existence of the sale and purchase agreements and ought to have advised the plaintiffs on this. It is the interveners' contention that since the common solicitors knew of the sale and purchase transaction, such knowledge should be imputed to the plaintiff (chargee) when the charge transaction was being carried out.

The rule is that where two parties employ the same solicitor, communications passing between either of them and the solicitor in his joint capacity must be disclosed in favour of the other, and further where the evidence showed that a party had placed himself entirely in the hands of his solicitor and constituted him his general agent in the transaction, the knowledge of the solicitor must be imputed to him: *Dixon* v *Winch*.[1] So in this case the knowledge of the solicitor that the interveners had bought two-thirds of the land before it was charged to the plaintiff, ought to be imputed to the plaintiff, and the plaintiff must be treated as having had notice of the sales to the interveners, before the land was charged to the plaintiff.

Counsel for the chargee did not dispute the allegation that since the same solicitors were involved in all the transactions, knowledge of the sale and purchase of the land by the interveners ought to be imputed to the plain-

tiff, but he denied there was any fraud on the part of the plaintiff, and insisted that a caveat ought to have been registered in the land office register by the purchasers.

In the case of the intervener Chua Choon Yam, he had not only paid the full purchase price, but had obtained on 8 June 1981, an order from the court that he be allowed to have possession of one-third of the land which he had bought which was 1,500 sq ft, together with one three-storey building on it (as per exh 'CCY1' annexed to his affidavit, affirmed on 7 May 1985). Chua Choon Yam was also allowed by the court damages for late possession to be assessed against the land owner.

It is true that a purchaser of land under an agreement has to protect his interest by filing a caveat against the land: *Haroon bin Guriaman* v *Nik Mah bte Nik Mat & Anor.*[2] But how many laymen have knowledge of 'caveat' and its application or purpose. That is the reason why the interveners had employed solicitors to do, and act for them in the purchase transactions. They have to rely on their solicitors who were acting professionally for them, to advise them and to file the caveats for them to protect their interests in the land.

It may be a different story altogether if each party had employed different solicitors to act for him. In such a case, the plaintiff can say that he has no knowledge that two-thirds of the land had been sold by the chargors before the charge was effected.

In the instant case, as admitted by the plaintiff's solicitors, the plaintiff ought to know of the sales which took place before the charge was created. The plaintiff or the common solicitors ought to have asked the purchasers of the land whether they agreed to have the land charged to the bank (plaintiff). The interveners in their affidavits said that they had never given their consent to their solicitors to have the lands charged to the bank.

In this case, if the plaintiff had not been told by the parties' common solicitors that the interveners had purchased two-thirds of the land before the whole land was charged to the plaintiff it certainly is not the fault of the purchasers.

I find there is no evidence that fraud had been practised on the chargee.

Under the circumstances, I hold that the plaintiff knew through their solicitors that the interveners were purchasers of a portion of the land. The charge of the whole land to the plaintiff could not be a valid charge since a substantial portion of it was not absolutely owned by the two defendants. There is nothing to prevent the plaintiff from proceeding against the defendants or any party who was negligent in handling the charge transactions.

Now that the first intervener had completed the purchase and had gone into possession, it would not be justified and would be plainly unconscionable to deprive him of the shophouse he had bought by holding that the charge was valid when in fact it was void, and consequently I refused to grant the plaintiff's application to have the land sold by public auction. I dismiss the plaintiff's application with costs to the interveners.

Application dismissed.

Solicitors: *JA Nathan & Co*; *E Ramasamy & Co*

Reported by *PS Ranjan*

Perwira Habib Bank Malaysia Bhd v Lim Hong Tatt

HIGH COURT (KUALA LUMPUR) – KOD NO C3-23-4296-86
SITI NORMA YAAKOB J
16 SEPTEMBER 1988

Banking – Overdraft facility – Whether limit of overdraft facility granted includes interest – Whether right to charge compound interest exists – Whether bank has power to increase rate of interest after termination of overdraft facility

The defendant has appealed against a summary judgment obtained against him, raising the following issues: (a) whether the limit of the overdraft facility provided by the plaintiffs includes interest as well, (b) whether the plaintiffs can charge compound interest and (c) whether the plaintiffs have any power to increase the rate of interest after the facility was terminated.

Held, dismissing the defendant's appeal in part with costs:

(1) The limit of the facility can only mean the maximum principal sum sanctioned by the overdraft on which interest at the rate agreed shall be levied. To assume that the limit includes interest as well would be contrary to logic and sound business practice, as the facility is a business transaction conducted by the plaintiffs in the course of their business as a banker. As such, it is not logical to expect the plaintiffs to advance money up to the sanctioned limit on an interest-free basis.

(2) The plaintiffs have every right to charge compound interest on the facility as that was a term agreed between them.

(3) Since the plaintiffs' letter of approval does not make any provision for any increase in the rate of interest, it would appear that the increase was an arbitrary act on the part of the plaintiffs and should not be allowed.

(4) The judgment to be entered against the defendant should only be for the amount as stated in prayer 1 of the statement of claim, with interest on the decretal sum at 8% pa from date of judgment to date of realization and costs.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 344 of 1988.]